

EXCERPTS FROM THE HEARINGS ON THE LEGISLATION DEALING
WITH INVASION OF FEDERAL EMPLOYEES' PRIVACY
SUBCOMMITTEE ON EMPLOYEE BENEFITS

Testimony of The Honorable Nick Galifianakis, Representative in Congress
of the United States from the Fourth District of the State of North Carolina

"Finally, Mr. Chairman, let me comment on the question raised about threats to our national security which might arise through this measure. I am not wedded to any certain language in Sections 7, 8, and 9 of this bill. But on the issue of national security I would merely call the Subcommittee's attention to a memorandum from the American Law Division of the Library of Congress submitted to this Committee in testimony from Senator Ervin in July of 1968.

It is the conclusion of experts in the American Law Division that the bill does recognize the security interests which necessitate deviation from some of its provisions. The memo goes on to say that it is difficult to see how any determination by a federal court or the Employees' Board would involve government secrets. For the bill clearly states that the only matters for review or adjudication would be violations of some prohibition of the Act.

The bill makes no attempt to deny the CIA, NSA or the FBI the right to execute secrecy agreements with its employees. Rather, the issue would turn upon whether specific provisions of H. R. 7969 have been violated. The memorandum from the Library of Congress concludes that a privacy bill such as this one would create little or no conflict with present laws regarding national security or confidential information on employees.

Mr. Chairman, such legislation as H. R. 7969 has been needed in the past to help protect our liberties. From what you have heard in past days, it must be obvious that it is needed now. If the present trends are any indication, it will be vitally needed in the future. I urge you to consider the data pointing to need for action and to make your judgment in light of the overwhelming evidence before you."

NOTE: The following are extracts from the questions raised by Committee members following testimony of Robert E. Hampton, Chairman of the Civil Service Commission. Extracts from Mr. Hampton's statement are not included because his statement was substantially the same as the draft already included in the book.

Mr. Hanley: "... Can you tell us if any agency other than the CIA or the NSA uses the polygraph in connection with the investigation of employees or applicants for employment?

Mr. Hampton: I do not know of any other unless--do you know?

Mr. Ruediger: I am confident that on occasion the FBI uses the polygraph. The Civil Service Commission issued in the Federal Personnel Manual about two and a half or three years ago an express prohibition against the use of the polygraph for any employment or employment purpose relating to competitive service employees, and we have required that any agency that wants to use the polygraph--and again as Chairman Hampton says, I emphasize we do not use it. It must come to the Chairman of the Commission and get written permission.

I do not deal in that area myself, but I have talked to Mr. Johnson in our Bureau of Personnel Investigations and I understand that only two agencies have even requested to use it with competitive service employees. But I want to emphasize--CIA, NASA--I do not mean NASA--

Mr. Hampton: NSA.

Mr. Ruediger: They are all excepted. They are not under the competitive service. One of the reasons they are excepted is because of the security nature, confidential nature of their work makes competitive appointment areas different.

Mr. Hogan: I specifically inquired, we went to NSA and discussed this with the officials out there. And I inquired if the FBI used the polygraph on employee matters. And I was assured that they did not. But in some cases they use it with investigations, but not with personnel.

Mr. Hanley: You mentioned two agencies did request from the Commission the use of the polygraph. Which agencies were they?

Mr. Ruediger: I would have to get that information, but I would be glad to supply it.

Mr. Hanley: If you will, please.

Mr. Hampton: I know since I have been Chairman of the Commission I have not been requested for this.

Mr. Hanley: If you will provide the Committee with the names of the two agencies that did apply, and apparently this application would have been made quite some time ago.

Mr. Wilson: . . . Mr. Hampton, you are against the legislation completely; is that right?

Mr. Hampton: I am opposed to the legislation as it is presently drafted.

Mr. Wilson: Would you help us draft a good bill?

Mr. Hampton: Yes, sir.

Mr. Wilson: In connection with the three agencies that we spent considerable time on, I will agree with you that we take one out we ought to take the other two out. I personally think there are protections in the bill that take care of the problems that would arise with any of the three agencies.

But Senator Ervin explained that he had to exempt the FBI in order to get the bill out of the Senate. They have a real good public relations operation going and apparently one more popular than the ones the CIA or NSA has. They are able to put more pressure on the congressmen more than the other two. I would say if we take one out the other two are entitled to be exempted also. But I would like to see all of them included until we find out whether there was some real problem created by them all be excluded.

Mr. Hampton: On those agencies we have had informal discussions with them and they will make their presentations and we believe that there is considerable security in their agencies for exception. And we have seen fit to either--they are exempted now by statute or other administrative things for certain exemptions because they are in the excepted services. And I think that these problems have to be treated very differently in those agencies because they are significantly different from the rest of the government.

Mr. Hampton: Mr. Chairman at this point may I mention one thing? I may be taking unfair advantage of Senator Ervin on this question, on this personality questionnaire. He brought that to our attention and he did not have an answer at the time that he testified. The answer was sent the day after when we had gotten the information. We found that only one agency had ever used this questionnaire. It was some six or seven years ago and it has never been used since and we can provide that report for the record if you would like to have it.

Mr. Hanley: Without objection, so ordered. (Information to be furnished)"

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Statement of Carl W. Clewlow, Deputy Assistant Secretary of Defense (Manpower and Reserve Affairs). . . .

"In Section I (e) the Department is prohibited from asking an employee about his "personal relationship" with any person connected with him by blood or marriage. The term "personal relationship" is not defined. Since questions about sexual conduct are also barred, it must refer to general day-to-day relationships. If the Department learned that an employee occupying a sensitive position was believed to be married to a suspected foreign agent it would be prohibited from questioning the association. Especially where an employee occupies a critical-sensitive position the Department would expect a higher degree of trustworthiness, and with it broader latitude to examine his suitability for such a position.

In Section I (f) the Department is prohibited from asking an employee to take a polygraph test regarding his "personal relationship" with his relatives, his religion or his sexual conduct. Under certain circumstances, polygraph tests should be permitted in specific cases which cannot otherwise be resolved. Under DoD Directive 5210.48, "the conduct of polygraph examinations and the selection, training and supervision of DoD polygraph examiners," July 13, 1965, polygraphs may be authorized but only if the individual voluntarily consents. If he does not so consent no adverse action may be taken against him. But if H. R. 7199 is enacted polygraph examinations will be virtually discontinued except under the extremely limited conditions specified in Section VI.

The restrictions on the use of polygraph by the Department of Defense are not paper restrictions. During the entire calendar year 1970 the Military Departments report that only a limited number of polygraphs have been conducted among the more than 1,142,063 employees of the Department of Defense.

In a number of these cases, polygraph examinations were requested by the employee in support of his contentions.

In Section I (i) the Department is prohibited from requiring an employee to disclose, or even ask about, his or his family's income and debts. For national security reasons, the Department believes this prohibition unwise. . . . The past history of security defection cases reflect that a large number of them resulted from an employee's financial difficulties. Consequently, it is in the best interests of national security that the Department be permitted to make appropriate inquiries where the employee is assigned to a position affecting the national security. I might add that these inquiries are of benefit to the employee in that they afford him an opportunity to explain or deny reports about his financial difficulties. Often times, his response may make unnecessary disciplinary or removal actions.

In Section I (k) the Department may not question an employee "who is under investigation for misconduct" without the presence of counsel or other person of his choice if he so requests. The words "who is under investigation for misconduct" is subject to varying interpretations. The Department has no objections to the presence of counsel if there is a formal criminal investigation under way. But whether the same requirement should apply to a supervisor's preliminary inquiries about minor infractions of the safety rule is a horse of another color. If such an inquiry without counsel subjects a supervisor to disciplinary action, the Department strongly objects.

Turning to Section IV, the provision giving unlicensed freedom to file a civil action in the U.S. District Court without regard to the customary jurisdictional prerequisites is patently unsound. The filing of frivolous and even spurious suits will be certainly encouraged, for a plaintiff need show no pecuniary injury, and no exhaustion of administrative remedies. All he need do is allege that one of his Section I "rights" has been violated. He need not even go to the Board of Employees' rights established by Section V. But he can start a departmental grievance proceeding under Section VIII, accompanied by the employee organization representing his bargaining unit, then abandon that action before final decision, and bring suit in the U.S. District Court. At this point he could tell his local union to "go to Pittsburgh" and permit "any employee organization" he elects to represent him. The result is disruption to the Department's grievance procedures, inherent conflict with employee-management relationships established by Executive Order 11491 and an over-burdened court calendar."

Extracts From the Question Period

Mr. Wilson: ". . . . Certainly it is not my intention to cause problems for any security agencies or any department of government in the type of cases that you mentioned or in any--to impede in anyway the protections you need in order to be sure that you have proper people employed in sensitive positions and so forth. I am interested--I am on the Armed Services Committee also, as you know, and, of course, the greater part of work you do is, has to do with that Committee. How many intelligence agencies are there in the Defense Department now? Do each of the branches, Military branches have their own?

Mr. Clewlow: I think that Mr. Froehlke addressed himself in part to that when he was talking to the bill by Mr. Ervin. The intelligence function is in the process of a reorganization, and I would--I have not checked with him as to the exact status of it. We have a National Security Agency which performs a certain classified function; we have an Army Security Agency, a Defense Intelligence Agency. This is in the process of revamping just at the present time the intelligence function. I would like to give you a specific answer for the record if I may on that.

Mr. Wilson: I think what has happened here, we are getting away from what President Truman tried to do when he established the CIA. I think it was during that time that the CIA was established. And the purpose for it being established was to eliminate this very problem that we are creating again of having so many different intelligence groups that are going off on their own way, and where we are not really consolidating our intelligence in one agency the way that I think it should properly be done.

Now, I do not know whether there is a particular reason why each branch of the Military has to have their own intelligence operation or whether they are cooperating with other agencies and coming up with the same information for the President or just what the final outcome is. Again this has nothing to do with this particular piece of legislation, but I was interested; however in just how many agencies we have and if we should not again reorganize. As you say, there is a reorganization program going on now, in this respect. Is that for the Defense Department only?

Mr. Clewlow: Yes, in the Defense Department. Mr. Andrews can make some comments on this.

Mr. Andrews: On December 23, 1970, Secretary Laird directed a complete re-examination of the intelligence and counter-intelligence functions of the Department of Defense. As a result he has issued two Directives dealing

with a limited portion of this area. He is in the process of receiving further studies looking to the objective of making more effective our intelligence and counter-intelligence operations.

In addition, there is a further study that does include other government intelligence agencies, and I saw a press announcement of this recently and there is a move afoot to proceed along the lines that you certainly are endorsing.

Mr. Wilson: I can see where it would be possible, if we except the FBI and NSA and CIA. Maybe we should except the Department of Defense, too, because so much of your work is really involved in intelligence work and-- I am not suggesting this, but I am saying that it probably makes as much sense as it does to except these other agencies.

Mr. Andrews: Yes, Mr. Wilson. We are very glad you see that problem, because what we are dealing with here is protection of classified information, particularly the highly classified information, cryptologic staff, the germ warfare stuff, which, as I understand now, is suspended, our war plans, our intelligence, and covert operations abroad and in the United States, and so on. Obviously, that same information which is in the CIA eventually finds its way to the Pentagon and from the Pentagon into the CIA. So the result is that the people that handle it should have the highest degree of trustfulness. So in this area, we think it is an extremely sensitive area of the DoD, we should enjoy the same latitude as would be observed by the CIA and the FBI under this legislation.

Mr. Wilson: May we--we may have to make some more inquiries. It may wind up as a consumer's bill or something, if we exempt everybody else.

Mr. Hanley: If Mr. Wilson would yield at this point, in recognition of the specific problem of departments dealing with intelligence, did I understand correctly that there are within the Defense Department two agencies dealing with intelligence and that is Army Intelligence and Defense Department of Intelligence? Are there--under the umbrella, are there other departments set up for the same purpose or similar purpose?

Mr. Andrews: Each of the Military Departments has an intelligence section that helps support the Defense Intelligence Agency.

In addition, we have the Army Security Agency which helps support the National Security Agency. These are the Chief Intelligence Arms.

Mr. Hanley: If we can go back to the matter of the polygraph for a moment, can you give us the details as to the qualifications, competence, and experience you require from the polygraph examiners?

Mr. Clewlow: I will ask Mr. Trammell to respond to that particular type of question, sir.

Mr. Trammell: We took additional interest in this as early as 1965 and we did establish criteria for the qualifications of polygraph operators and also the training that must be carried out. The training in, since 1965, we have required either that the operators be--have college degrees, a four-year college degree, or have two years college with some additional training, two years practical experience. And then the only thing we did to recognize the existing situation, we did have a grandfather clause wherein the discretion of the head of the agency controlling the polygraph operators, he made some additional findings that their education and experience were either equivalent or they had eight years' practical experience.

So we have made a very great effort to see that the persons were highly qualified. In addition, we have specified a rather elaborate training program. The training program covers a number of significant features, such as training in the investigative techniques, methods of interrogation, basic elements of psychology, both normal, abnormal, and criminal, constitutional and other legal considerations, and physiology, and a number of other factors. The basic elements of psychology, the constitutional law, and sociology are directed by the Secretary of Defense to be given by a qualified medical or legal personnel, depending on what the examination is.

And appropriate refresher training is necessary and given. The Army, Navy, and Air Force all take a basic concentrated thirteen week course run by the Army Provost Marshal at Fort Gordon, Georgia, and the Main Intelligence Agency has a special school of its own in Chicago run somewhat different because they have a slightly different requirement. But it is also highly professional training.

Mr. Hanley: Does the examiner work with a specified--rather set of specified questions, or is he allowed to use a great deal of discretion?

Mr. Trammell: He is given--his discretion relates to the factual situation that is put before him. But not to the method of approaching the problem. That is, his training definitely does keep him away from the kinds of questions that the--that are unnecessarily probing in themselves.

Mr. Hanley: But he does not work with a set of specified questions? Is that true?

Mr. Trammel: No. There are generally--I will not attempt to give a completely technical explanation of this--but the system involves qualifying questions and then going over the actual questions to be asked. The qualifying questions are merely for the purpose of testing the machine, to note the man's reaction under certain conditions.

Mr. Clewlow: Mr. Chairman, could I respond in part to that? Our regulations provide for certain safeguards, and I will read from the regulations: "Care must be taken not to inject improper matters into security inquiries, whether in the course of security investigation or in other phases of security proceedings. For example religious beliefs and affiliations or beliefs or opinions regarding racial matters, political beliefs, and affiliation of non-subversive nature, opinions regarding the constitutionality of legislative policies and affiliations with labor unions are not proper subjects for such inquiries."

Then it goes on to state further that inquiries which have no relevance could not be made.

Mr. Hanley: With regard to the matter of psychological testing, has that posed any particular problem? By that, I mean have applicants or other personnel subsequently submitted complaints?

Mr. Clewlow: I have no knowledge of any complaints on my own, but I would ask the representatives of the services. (The representatives of each of the services responded in the negative.)